WANGSA TIMBER INDUSTRIES SDN BHD

v.

ADULFAST ANTHONY ROBERT & ANOR

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: S-02-842-1995]
19 SEPTEMBER 2001

CIVIL PROCEDURE: *Costs - Interlocutory proceedings - Discretion of court to award costs - Whether court awarded costs correctly*

This was the defendant's appeal against the decision of the learned judge awarding costs against the defendant in relation to the main suit concerning a right of way in respect of a driveway. It contended that the issue upon which the present costs were awarded arose from an interlocutory application and, as such, the appropriate order to be given should have been costs to follow the event as the interlocutory order would not finally determine the issue between the parties.

Held:
Per Mokhtar Sidin JCA

[1] The plaintiffs applied for the injunction as a matter of necessity to prevent the defendant from damaging, demolishing and obstructing the driveway. Since it was decided in the main suit that the plaintiffs had a right of way in respect of the driveway, the injunction was justified. Hence, the learned judge had not erred in exercising his discretion in awarding costs against the defendant in respect of this application.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan defendan menentang keputusan hakim yang bijaksana untuk memberi kos menentang defendan, yang berkaitan dengan guaman utama melibatkan hak laluan berkenaan dengan jalan masuk rumah. Defendan mengadu bahawa isu yang mengakibatkan kos tersebut, tertimbul daripada injunksi interlokutori dan, oleh itu, perintah yang sepatutnya diberikan ialah kos menyusuli keadaan kerana perintah interlokutori tidak dapat menentukan dengan muktamad isu di antara pihak-pihak yang terlibat.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Plaintif memohon untuk mendapatkan injunksi kerana perlu mencegah defendan daripada merosakkan, memusnahkan dan menghalang jalan masuk rumah tersebut. Oleh kerana ia telah diputuskan di dalam guaman utama bahawa plaintif-plaintif mempunyai hak laluan berkaitan dengan jalan masuk rumah tersebut, injunksi itu dijustifikasikan. Oleh itu, hakim yang bijaksana tidak membuat kesilapan dalam melaksanakan budi bicara untuk memberi kos menentang defendan dalam permohonan ini.

[Rayuan ditolak.]

Legislation referred to:
Rules of the High Court 1980, O. 29 r. 1(2), (2B)

For the appellants - Marina Tiu; M/s Yap Chin & Tiu
For the respondents - Clement Skinner; M/s Skinner Lind Willie Wong & Chin

[Appeal from High Court, Kota Kinabalu; Suit No: K22-178-1994]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:
The appellants in the present appeal were the defendants in the court below while the respondents were the plaintiffs. We will refer to the parties as they were in the court below.

The plaintiffs, by way of an *ex parte* summons in chambers dated 17 November 1994 prayed for the following order:

1. The defendant whether by themselves, their servants, agents or otherwise howsoever be restrained from doing any acts or deeds that would impede or deny the plaintiffs access to the dominant tenement held under CL 015276418 through the servient tenement held under CL 01526409 by using the existing driveway or any part thereof or doing any act to damage or demolish the existing driveway on the servient tenement.
2. That the plaintiffs undertake to abide by any order the court or judge may make as to damages in case the court or judge should hereafter be of the opinion that the defendant shall have sustained any damage by reason of the orders sought herein which the plaintiffs ought to pay.
3. That the cost of this application be paid by the defendant.

The learned judge granted the interim injunction on 17 November 1994. On 25 November 1994 the plaintiffs filed an *inter partes* summons in chambers and prayed for the following reliefs:

1. an extension to the order for interim injunction dated 17 November 1994 obtained by *ex parte* summons in chambers application dated 17 November 1994;

2. a mandatory order that the defendant whether by themselves, their servants, agents or otherwise howsoever do restore that portion of the driveway which has been demolished on the servient tenement to allow vehicular access to the plaintiffs' house in the dominant tenement;

3. the plaintiffs undertake to abide by any order the court or judge may make as to damages in case the court or judge should hereafter be of the opinion that the defendant shall have sustained any damage by reason of the orders sought herein which the plaintiffs ought to pay;

4. that the cost of this application be paid by the defendant.

The plaintiffs filed an affidavit in support giving full facts and circumstances leading to this application. The defendants resisted the application by filing an affidavit in reply dated 9 January 1995 opposing the *inter partes* summons in chambers of the plaintiffs and prayed the application be dismissed with cost.

The learned judge allowed the plaintiffs' application and awarded cost against the defendants. Being dissatisfied with that decision the defendants appealed to this court. From the record, the present appeal is only in respect of the order for cost. Paragraph 1 of the memorandum of appeal states:

1. The Judicial Commissioner erred in law when he granted the costs of the Respondents' application for interlocutory injunction to the Respondents in any event in that:

   (i) he exercised his discretion mechanically and not judicially;

   (ii) the learned Judicial Commissioner did not direct his mind that the order granted on the 6th day of March 1995 being only interlocutory does not finally determine the issue between the Respondents and the Appellants; and/or

   (iii) the learned Judicial Commissioner failed to consider that unless there are cogent reasons that some other order should be made the order as to costs in interlocutory matters should have been costs to follow the event.

It is clear from the judgment, no reason was given by the learned judge for awarding cost against the defendants. This is understandable because the principle issue in the application was the injunction to which the learned judge had given a lengthy judgment showing that the parties took a lot of preparation to argue on the injunction.

It is unfortunate that the notes of evidence in respect of this application is not available in the record of appeal. We are not sure how the issue of cost was argued in the court below but from the judgment of the learned judge we are of the view that nothing much, if not none, was said by the parties in respect of cost.

With that scenario, we now deal with the present appeal. Before us the learned counsel for the defendants conceded that cost is a matter of discretion for the judge but then she said though it is a matter of discretion, the learned judge erred in exercising that discretion because he did it mechanically and not judiciously. Firstly, we are not sure what is meant by mechanically. No instances were cited to us how a mechanical discretion operates. The defendants also failed to show us how the learned judge in exercising his discretion did it mechanically. No authority was cited to us.

It was contended before us by the learned counsel for the defendants that the issue upon which the present cost was awarded arose from an interlocutory application and as such the appropriate order to he given is cost to follow event. Her reason for the contention is that the interlocutory order ensues does not finally determine the issue between the parties.

There is no doubt that the issue of cost which is the subject matter of this appeal, arose from an interlocutory application for injunction to stop the defendants from damaging, demolishing and obstructing the driveway to the plaintiffs' house and land. The main issue is the claim by the plaintiffs for easement of right of way in respect of the driveway. When the present application came up for hearing before us the appeal in respect of the main issue had been decided by us whereby we confirmed the decision of the learned judge in that the plaintiffs had acquired easement of right of way in respect of the driveway.

In the present appeal the plaintiffs took up an application under O. 29 r. 1(2) seeking interlocutory injunction to stop the defendants from damaging, demolishing and obstructing the driveway. Due to the urgency to stop the defendants' act of damaging, demolishing and obstructing, the application was made by way of *ex parte*. The court awarded the injunction which under O. 29 r. 1(2B) have a life span of only two weeks. Before the expiry of the two weeks, the plaintiffs by an *inter partes* application applied to

the court to have the injunction extended indefinitely until the main issue of easement is resolved. It is plain to us that the defendants resisted the application to extend the injunction indefinitely. Judging from the judgment of the learned judge the plaintiffs had no choice but to resort to the court to stop the defendants from damaging, demolishing and obstructing the driveway. It is clear to us it is a matter of necessity that the plaintiffs applied for the injunction pending the outcome of the issue of the main suit. We have heard the appeal in respect of the main suit and we are familiar with the issue which is the claim for easement of right of way in respect of the driveway. The injunction applied for by the plaintiffs was to stop the defendants from damaging, demolishing and obstructing the driveway. In order to justify the injunction, the plaintiffs have to show that they have a right to the driveway. For that reason the learned judge in exercising his discretion awarded cost to the plaintiffs in respect of this application.

We are of the view that the learned judge had not erred in exercising his discretion in awarding cost against the defendants in respect of this application. In fact, we find there are ample evidence to justify his discretion in awarding cost against the defendants.

In view of the above, the appeal is hereby dismissed. The decision of the learned judge in awarding cost against the defendants in respect of this application is affirmed. The learned counsel for the plaintiffs is not pressing for cost in the appeal before us. We make no order as to cost in this court. The deposit in respect of this appeal is hereby ordered to be refunded to the appellants.

My learned brother, Dato' Abu Mansor Ali, who has the opportunity of reading this judgment in draft, has expressed his concurrence with this judgment.